STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 14, 1999
v	No. 207550 Shiawassee Circuit Court
DARREN LEE BENTLEY, Defendant-Appellant.	LC No. 97-000398 FH

Before: Hoekstra, P.J., and McDonald and Meter, JJ.

PER CURIAM.

Defendant was convicted by jury of third-degree criminal sexual conduct (sexual penetration of a person at least thirteen years of age and under sixteen years of age), MCL 750.520d(1)(a); MSA 28.788(4)(1)(a). The trial court sentenced him to 72 to 180 months' imprisonment. Defendant appeals as of right. We affirm.

Defendant first argues that he was denied his right to a fair trial due to the trial court's remarks during voir dire to a juror, who later served as the jury foreperson In particular, defendant maintains that statements regarding the personal acquaintance of the trial judge and his family with the juror improperly cast the juror in a favorable light before the other jurors and pierced the veil of judicial impartiality. We disagree. Because no objection to the trial court's conduct was raised below, this claim is unpreserved; however, we may review this claim if manifest injustice would result from our failure to review. *People v Paquette*, 214 Mich App 336, 340; 543 NW2d 342 (1995); *People v Collier*, 168 Mich App 687, 697; 425 NW2d 118 (1988). Upon review of the record as a whole, including the specific comments upon which defendant focuses, we find that the trial court's remarks did not pierce the veil of judicial impropriety. *Paquette, supra*; *Collier, supra* at 697-698. We conclude that the comments at issue, read in context, merely establish a rather casual acquaintance between the juror and the trial judge. Further, the remarks were made at a point in the trial where the trial court was simply attempting to elicit background information and to assist the parties and the jurors with getting acquainted with one another. We do not believe, under these circumstances, that it is reasonable to conclude that the trial court's conduct unduly or inappropriately influenced the other jurors. Consequently, we find no manifest injustice and we decline to review this issue further.

Defendant next argues that he was deprived a fair trial because of ineffective assistance of counsel. Specifically, defendant claims that the following acts or omissions of his trial counsel constitute ineffective assistance of counsel: failure to object to the prosecution's motion to amend the information; failure to object to the prosecution's late endorsement of a witness; failure to object to admission into evidence at trial of two letters written by defendant; failure to utilize peremptory challenges to exclude three particular jurors; failure to call additional witnesses at trial; and making prejudicial remarks during his opening statement. We disagree. To establish ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that the deficient performance prejudiced the defense. *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Hoag*, 460 Mich 1, 5; 594 NW2d 57 (1999). In addition, "a defendant must also overcome the presumption that the challenged action was trial strategy, and must establish 'a reasonable probability that, but for counsel's unprofessional errors, the result would have been different.'" *Hoag, supra* at 6, quoting *People v Johnson*, 451 Mich 115, 124; 545 NW2d 637 (1996). With regard to matters of trial strategy, this Court will not second-guess counsel, nor assess counsel's competence with the benefit of hindsight. *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999).

Upon review of the record, we conclude that defendant has failed to demonstrate that he was denied a fair trial because of ineffective assistance of counsel. Although defendant delineates on appeal what he perceives to be his counsel's egregious errors, he fails to demonstrate how his counsel's allegedly deficient performance prejudiced his defense. *Hoag, supra* at 5. Instead, defendant provides mere speculation that the result may have been different had trial counsel made different decisions. Moreover, defendant has failed to establish that any of defense counsel's acts or omission were anything other than matters of trial strategy. That a strategy does not work does not render its use ineffective assistance of counsel. *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996).

Defendant also argues that the trial court erred in scoring offense variable seven when determining the sentencing guidelines range, which led to a disproportionate sentence. Essentially, defendant argues that the record was devoid of facts to support the assessment of fifteen points under that variable. We disagree. In *People v Mitchell*, 454 Mich 145, 174-175; 560 NW2d 600 (1997), noting that the sentencing guidelines are not a product of legislative action, our Supreme Court explained, "because this Court's guidelines do not have the force of law, a guidelines error does not violate the law. Thus, the claim of a miscalculated variable is not in itself a claim of legal error." Further, the Court discussed the extent of our review:

> Appellate courts are not to interpret the guidelines or to score and rescore the variables for offenses and prior record to determine if they were correctly applied. Guidelines are tools to aid the trial court in the exercise of its authority and a framework for the appellate courts' inquiry into the question whether the sentence is disproportionate and, hence, an abuse of the trial court's discretion. [*Id.* at 178.]

A claim challenging the "application of the guidelines states a cognizable claim on appeal only where (1) a factual predicate is wholly unsupported, (2) a factual predicate is materially false, *and* (3) the sentence

is disproportionate." *Id.* at 177 (emphasis supplied); *People v Raby*, 456 Mich 487, 496-497; 572 NW2d 644 (1998). A sentence constitutes an abuse of discretion when it is disproportionate to the seriousness of the circumstances surrounding the offense and the offender. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990); *People v Honeyman*, 215 Mich App 687, 697; 546 NW2d 719 (1996).

We have reviewed defendant's sentence and find that it is not disproportionate. Although defendant had no prior criminal record, there is compelling evidence that defendant engaged in a pattern of sexual exploitation of the underage complainant. Defendant frequently provided complainant alcohol or marijuana before engaging in numerous sex acts. The evidence suggests that defendant used his influence as complainant's father figure to engage in the sex acts and that defendant, on one occasion, physically forced complainant to perform oral sex. Thus, considering the seriousness of the circumstances surrounding the offense and the offender, we conclude that defendant's sentence was proportionate. As our Supreme Court explained in *Raby, supra* at 496, "[w]here, as here, the sentence is not disproportionate, there is no basis for relief on appeal."

Further, to the extent defendant argues that the factual predicate for the assessment on offense variable seven was based on unsupported and materially false information, we find his claim without merit. To the contrary, the record is replete with facts suggesting that defendant exploited the victim based on the victim's youth and defendant's authority status.

Because defendant's foregoing arguments are without merit, and therefore remand is unnecessary, we need not address defendant's final argument that a different judge should preside over the case on remand.

Affirmed.

/s/ Joe. P. Hoekstra
/s/ Gary R. McDonald
/s/ Patrick M. Meter